



For a thriving New England

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October 21, 2016

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d/b/a M. Bradsher Co., Inc.  
181 Exeter Rd.  
Epping, NH 03042

Malcolm Bradsher, Registered Agent  
Malcom Bradsher Co., Inc.  
d/b/a M. Bradsher Co., Inc.  
181 Exeter Rd.  
Epping, NH 03042

**VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED**

RE: Notice of Violations and Intent to File Suit under the Clean Water Act

To Whom It May Concern:

The Conservation Law Foundation (“CLF”)<sup>1</sup> hereby gives notice to the addressed persons of its intent to file suit pursuant to Section 505 of the Federal Water Pollution Control Act (“Clean Water Act,” “CWA,” or “Act”), 33 U.S.C. § 1365(a), for violations of the Act specified below. This letter constitutes notice pursuant to 40 C.F.R., Part 135 (the “Notice”) to the addressed persons of CLF’s intention to file suit in United States District Court of the District of New Hampshire seeking appropriate equitable relief, civil penalties, and other relief no earlier than 60 days from the postmark date of this Notice letter.

The subject of this action is twofold. First, Malcolm Bradsher Co., Inc. (hereinafter “M. Bradsher”) is discharging stormwater directly associated with the construction sand and gravel facilities located at 181 Exeter Rd., Epping, NH 03042 and 541 Farmington Rd. (NH Route 11), Farmington, NH 03835 (the “Facilities”), to the waters of the United States without a permit, in violation of 33 U.S.C. §§ 1311(a) and 1342(p)(2)(B). Second, M. Bradsher has failed to obtain

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<sup>1</sup> CLF is a not-for-profit 501(C)(3) organization dedicated to the conservation and protection of New England’s environment. Its mission includes the conservation and protection of the many uses of the waters in and around the Piscataqua-Salmon Falls watershed for, among other things, fishing, recreation, boating, scenic/aesthetic, and scientific purposes. CLF’s membership includes people who live in or near the Piscataqua-Salmon Falls watershed, and use and enjoy the watershed for recreational, aesthetic, and/or scientific purposes. The interests of CLF’s members are adversely affected by the Facilities’ discharges of stormwater pollution to the receiving waters without a permit and in violation of the Clean Water Act.

coverage under any Clean Water Act permit including the Multi-Sector General Permit<sup>2</sup> (“MSGP”) adopted by the United States Environmental Protection Agency (“EPA”) for industrial sources of polluted stormwater runoff, and failed to comply with the specific requirements of any such permit, in violation of Sections 402(p)(3)(A) and 402(p)(4)(A) of the CWA, 33 U.S.C. §§ 1342(p)(3)(A) and (p)(4)(A), and 40 C.F.R. §§ 122.26(c)(1) and (e)(1). In addition, to the extent that M. Bradsher uses water in its industrial processes, M. Bradsher has failed to obtain individual National Pollutant Discharge Elimination System (“NPDES”) permit coverage for the Facilities’ process water discharges.

## **BACKGROUND**

The Fresh River and the Cocheco River are waterbodies in the Piscataqua-Salmon Falls watershed. The M. Bradsher facility located at 181 Exeter Rd., Epping, NH 03042 discharges into the Fresh River at Waterbody NHRIV600030708-02. The Fresh River (Waterbody ID NHRIV600030708-02) flows downstream into the Piscassic River (Segment IDs NHRIV600030708-06 and NHRIV600030708-07), which thereafter flows to the Lamprey River (Segment ID NHIMP600030709-03). The Lamprey River eventually flows into Great Bay and the Atlantic Ocean. The M. Bradsher facility located at 541 Farmington Rd. (NH Route 11), Farmington, NH 03835 discharges into the Cocheco River at Segment NHRIV600030603-01. After Segment NHRIV600030603-01, the Cocheco River flows downstream and outlets into the Piscataqua River. The Piscataqua River eventually outlets into the Gulf of Maine and the Atlantic Ocean. EPA has designated the Fresh River (Waterbody ID NHRIV600030708-02) and Segment NHRIV600030708-07 of the Piscassic River as habitats for “aquatic life harvesting,” “fish, shellfish, and wildlife protection and propagation,” and the public water supply.<sup>3</sup> EPA has designated Segment NHRIV600030708-06 of the Piscassic River as a habitat for “aquatic life harvesting” and a public water supply.<sup>4</sup> EPA has designated Segment NHRIV600030603-01 of the Cocheco River and Segment NHIMP600030709-03 of the Lamprey River as habitats for

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<sup>2</sup> ENVIRONMENTAL PROTECTION AGENCY, MULTI-SECTOR GENERAL PERMIT FOR STORMWATER DISCHARGES ASSOCIATED WITH INDUSTRIAL ACTIVITY (MSGP) (June 5, 2015), [https://www.epa.gov/sites/production/files/2015-10/documents/msgp2015\\_finalpermit.pdf](https://www.epa.gov/sites/production/files/2015-10/documents/msgp2015_finalpermit.pdf) [hereinafter MSGP].

<sup>3</sup> See U.S. ENVTL. PROTECTION AGENCY, 2012 WATERBODY REPORT FOR THE FRESH RIVER, PWS, CLS-A (WATERBODY NHRIV600030708-02) (2012), [https://ofmpub.epa.gov/waters10/attains\\_waterbody.control?p\\_au\\_id=NHRIV600030708-02&p\\_cycle=2012](https://ofmpub.epa.gov/waters10/attains_waterbody.control?p_au_id=NHRIV600030708-02&p_cycle=2012); U.S. ENVTL. PROTECTION AGENCY, 2012 WATERBODY REPORT FOR THE PISCASSIC RIVER, PWS, CLS-A (SEGMENT NHRIV600030708-07) (2012), [https://ofmpub.epa.gov/waters10/attains\\_waterbody.control?p\\_au\\_id=NHRIV600030708-07&p\\_list\\_id=NHRIV600030708-07&p\\_cycle=2012](https://ofmpub.epa.gov/waters10/attains_waterbody.control?p_au_id=NHRIV600030708-07&p_list_id=NHRIV600030708-07&p_cycle=2012).

<sup>4</sup> See U.S. ENVTL. PROTECTION AGENCY, 2012 WATERBODY REPORT FOR THE PISCASSIC RIVER, PWS, CLS-A (SEGMENT NHRIV600030708-06) (2012), [https://ofmpub.epa.gov/waters10/attains\\_waterbody.control?p\\_au\\_id=NHRIV600030708-06&p\\_cycle=2012](https://ofmpub.epa.gov/waters10/attains_waterbody.control?p_au_id=NHRIV600030708-06&p_cycle=2012).

“aquatic life harvesting,” “fish, shellfish, and wildlife protection and propagation,” a public water supply, and recreation.<sup>5</sup> The use of the aforementioned waterbodies for other purposes remains unassessed at this time.

EPA has designated the Fresh River (Waterbody ID NHRIV600030708-02) and Segment NHRIV600030708-07 of the Piscassic River as impaired pursuant to Section 303(d) of the Act, 33 U.S.C. § 1313(d), for failure to meet minimum water quality standards.<sup>6</sup> Waterbody NHRIV600030708-02 and Segment NHRIV600030708-07 are impaired for organic enrichment/oxygen depletion (dissolved oxygen saturation), mercury, and pH/acidity/caustic conditions. Stormwater is a probable source of impairments in Waterbody NHRIV600030708-02 and Segment NHRIV600030708-07.<sup>7</sup>

EPA has designated Segment NHRIV600030708-06 of the Piscassic River as impaired pursuant to Section 303(d) of the Act, 33 U.S.C. § 1313(d), for failure to meet minimum water quality standards.<sup>8</sup> Segment NHRIV600030708-06 is impaired for mercury. Stormwater is a probable source of impairments in Segment NHRIV600030708-06.<sup>9</sup>

EPA has designated Segment NHIMP600030709-03 of the Lamprey River as impaired pursuant to Section 303(d) of the Act, 33 U.S.C. § 1313(d), for failure to meet minimum water quality standards.<sup>10</sup> Segment NHIMP600030709-03 is impaired for mercury and pH/acidity/caustic conditions. Stormwater is a probable source of impairments in Segment NHIMP600030709-03.<sup>11</sup>

EPA has designated Segment NHRIV600030603-01 of the Cocheco River as impaired pursuant to Section 303(d) of the Act, 33 U.S.C. § 1313(d), for failure to meet minimum water quality standards.<sup>12</sup> Segment NHRIV600030603-01 is impaired for organic enrichment/oxygen depletion (dissolved oxygen saturation), mercury, pH/acidity/caustic conditions, aluminum, iron,

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<sup>5</sup> See U.S. ENVTL. PROTECTION AGENCY, 2012 WATERBODY REPORT FOR THE COCHECO RIVER (SEGMENT NHRIV600030603-01) (2012), [https://ofmpub.epa.gov/waters10/attains\\_waterbody.control?p\\_auid=NHRIV600030603-01&p\\_list\\_id=NHRIV600030603-01&p\\_cycle=2012](https://ofmpub.epa.gov/waters10/attains_waterbody.control?p_auid=NHRIV600030603-01&p_list_id=NHRIV600030603-01&p_cycle=2012); U.S. ENVTL. PROTECTION AGENCY, 2012 WATERBODY REPORT FOR THE LAMPREY RIVER – MACALLEN DAM (SEGMENT NHIMP600030709-03) (2012), [https://ofmpub.epa.gov/waters10/attains\\_waterbody.control?p\\_auid=NHIMP600030709-03&p\\_list\\_id=NHIMP600030709-03&p\\_cycle=2012](https://ofmpub.epa.gov/waters10/attains_waterbody.control?p_auid=NHIMP600030709-03&p_list_id=NHIMP600030709-03&p_cycle=2012).

<sup>6</sup> See 33 U.S.C. § 1313(d).

<sup>7</sup> See U.S. ENVTL. PROTECTION AGENCY, *supra* note 3.

<sup>8</sup> See 33 U.S.C. § 1313(d).

<sup>9</sup> See *supra* note 5.

<sup>10</sup> See 33 U.S.C. § 1313(d).

<sup>11</sup> See *supra* note 7.

<sup>12</sup> See 33 U.S.C. § 1313(d).

lead, ammonia, and pathogens (E. coli). Stormwater is a probable source of impairments in Segment NHRIV600030603-01.<sup>13</sup>

Stormwater is water from precipitation events that flows across the ground and pavement after it rains or after snow and ice melt.<sup>14</sup> Industrial activities, such as material handling and storage, equipment maintenance and cleaning, industrial processing, and other operations that occur at industrial facilities, may be exposed to stormwater.<sup>15</sup> Stormwater from industrial facilities, contaminated with pollutants, is then conveyed into nearby waterbodies.<sup>16</sup>

For both of its facilities, M. Bradsher is required to apply for coverage under a Clean Water Act discharge permit—such as the MSGP—in order to discharge lawfully. Since at least 2010, M. Bradsher has been specifically required to apply for coverage under the MSGP by filing a Notice of Intent (“NOI”) within 90 days after the initial issuance of the MSGP.<sup>17</sup> On June 16, 2015, after expiration of the prior permit, the EPA issued a new MSGP requiring all covered facilities to file an NOI for coverage under the 2015 permit.

For both of its facilities, M. Bradsher has failed to obtain coverage under the MSGP or any other valid authorization, at any time. Therefore, M. Bradsher is operating in violation of the Clean Water Act.

### **PERSONS RESPONSIBLE FOR ALLEGED VIOLATIONS**

Malcolm Bradsher Co., Inc. is the person, as defined by 33 U.S.C. § 1362(5), responsible for the violations alleged in this Notice. M. Bradsher has operated at least one of its Facilities since at least 1999, and currently advertises as the operator of both Facilities.<sup>18</sup> M. Bradsher and its agents and directors—including but not limited to Malcolm Bradsher, President—have operational control over the day-to-day industrial activities at these Facilities. Therefore, they are responsible for managing stormwater at the Facilities in compliance with the Clean Water Act.

### **LOCATION OF THE ALLEGED VIOLATION**

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<sup>13</sup> See *supra* note 6.

<sup>14</sup> See 40 C.F.R. § 122.26(b)(13).

<sup>15</sup> See 40 C.F.R. § 122.26(b)(14).

<sup>16</sup> See 58 Fed. Reg. 61,146, 61,154 (November 19, 1993).

<sup>17</sup> EPA’s Final National Pollutant Discharge Elimination System Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity (MSGP) was first issued in 1995 and later reissued in 2000, 2008, and 2015. See 60 Fed. Reg. 50,804 (Sept. 29, 1995); 65 Fed. Reg. 64,746 (Oct. 30, 2000); 73 Fed. Reg. 56,572 (Sept. 29, 2008); 80 Fed. Reg. 34,403 (June 16, 2015); see also MSGP, *supra* note 2, at pts. 1.1–1.2.

<sup>18</sup> See NEW HAMPSHIRE DEP’T OF STATE CORP. DIV., MALCOLM BRADSHER CO., INC., <https://www.sos.nh.gov/corporate/soskb/Corp.asp?433060> (last visited October 20, 2016).

The violations alleged in this Notice have occurred and continue to occur at the construction sand and gravel facilities located at 181 Exeter Rd., Epping, NH 03042 and 541 Farmington Rd. (NH Route 11), Farmington, NH 03835.

### **ACTIVITIES ALLEGED TO BE VIOLATIONS**

M. Bradsher has engaged, and continues to engage, in “industrial activities” and its operations fall under SIC code 1442, within the meaning of 40 C.F.R. § 122.26(b)(14).<sup>19</sup> Because the Facilities have a primary SIC code of 1442 and discharges stormwater associated with industrial activity, M. Bradsher is required to apply for, obtain coverage, and comply with the requirements of a NPDES permit such as the MSGP. M. Bradsher has failed to take any of these required steps.

Activities at the Facilities include, but are not limited to: storing, moving, and processing sand and gravel (exposed aggregate), and other materials outside or otherwise exposing them to the elements; operating and storing heavy machinery and equipment outdoors; and driving vehicles on and off the Facilities thereby tracking pollutants off-site. All of these activities at the Facilities have contaminated the sites with industrial pollutants.

Sand and gravel (exposed aggregate), and other materials; machinery and equipment; and vehicles at the Facilities are exposed to precipitation and snowmelt. Precipitation falls on and flows over the sand and gravel piles, machinery and equipment, and vehicles, picking up dust, total suspended solids (TSS), total dissolved solids (TDS), fines, diesel/gas fuel, oil, heavy metals, trash, and other pollutants associated with the Facilities’ operations. The polluted runoff is then conveyed off-site into waters of the United States.

In addition, to the extent that M. Bradsher uses water in its industrial processes, including but not limited to washing sand, rock and gravel and spraying water on rock crushing and sorting machinery, that water becomes “process wastewater” (also referred to as “process water”) as defined in 40 C.F.R. § 122.2.<sup>20</sup> Discharges of process wastewater are not covered under the Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity. Instead, discharges of process wastewater shall be covered under an individual NPDES permit. CLF intends to pursue claims related to M. Bradsher’s unpermitted discharges of process water to waters of the United States.

### **STANDARDS AND LIMITATIONS ALLEGED TO HAVE BEEN VIOLATED**

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<sup>19</sup> See MSGP, *supra* note 2, at appen. D–J2. Construction sand and gravel facilities identified by the SIC code 1442 are subject to the requirements of the MSGP for stormwater discharges.

<sup>20</sup> Defining “Process wastewater” as “any water which, during manufacturing or processing, comes into direct contact with or results from the production or use of any raw material, intermediate product, finished product, byproduct, or waste product.”

The Clean Water Act prohibits the discharge of pollutants to the waters of the United States except in accordance with a valid NPDES permit.<sup>21</sup> M. Bradsher discharges stormwater associated with its industrial activity, as defined by 40 C.F.R. § 122.26(b)(14), from its Facilities into waters of the United States. Because M. Bradsher has not obtained coverage for these stormwater discharges under the MSGP or an individual NPDES permit, it is illegally discharging stormwater without a permit, in violation of Sections 301(a) and 402(p)(2)(B) of the CWA, 33 U.S.C. §§ 1311(a) and 1342(p)(2)(B).<sup>22</sup> By failing to apply for and comply with the specific requirements of the MSGP, M. Bradsher is in violation of Sections 402(p)(3)(A) and 402(p)(4)(A) of the CWA, 33 U.S.C. §§ 1342(p)(3)(A) and (p)(4)(A), and 40 C.F.R. §§ 122.26(c)(1) and (e)(1). In addition, unpermitted discharges of process wastewater constitute violations of 33 U.S.C. § 1311(a). To the extent that M. Bradsher uses water in its industrial processes, CLF puts M. Bradsher on notice that CLF intends to pursue claims related to M. Bradsher's unpermitted discharges of process wastewater to waters of the United States.

**a. M. Bradsher is discharging stormwater to waters of the United States without a permit.**

M. Bradsher is an industrial discharger with a primary SIC code of 1442 which means that pursuant to Section 402(p) of the Act, M. Bradsher is obligated to apply for coverage under the MSGP or obtain other legal authorization. Because M. Bradsher has operated and continues to operate without a permit under Section 402(p), M. Bradsher is in violation of Section 301(a) of the Act.

In addition, during storm events, M. Bradsher's "industrial activities" at its Facilities have resulted in a "discharge of pollutants" within the meaning of 33 U.S.C. § 1362(12) and "stormwater discharge associated with industrial activity" within the meaning of 40 C.F.R. § 122.26(b)(14), from its Facilities on each and every day that there has been a measurable precipitation event of above 0.1 inches.<sup>23</sup> There have been many such storm events since 1979. The Facilities are generating pollutants from and through at least the following point sources: the sand, gravel, and various other material piles that are open to the elements; the machines and equipment left outdoors, and the vehicles driving on and off the Facilities, while additionally conveying pollutants through site grading, surface water channels, subsurface hydrological connections, detention ponds, culverts, and other conveyances to the Fresh River and the Cocheco River.<sup>24</sup> The Fresh River flows into the Piscassic River, which thereafter flows into the

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<sup>21</sup> 33 U.S.C. § 1311(a).

<sup>22</sup> See 33 U.S.C. § 1362(12); 40 C.F.R. § 122.2; see also MSGP, *supra* note 2, at appen. A (defining the term "discharge of a pollutant" as, *inter alia*, "any addition of any 'pollutant' or combination of pollutants to 'waters of the United States' from any 'point source'").

<sup>23</sup> See 40 C.F.R. § 122.26(c)(i)(E)(6). EPA has determined that precipitation greater than 0.1 inches in a 24-hour period constitutes a measurable precipitation event for the purposes of evaluating stormwater runoff associated with industrial activity.

<sup>24</sup> These discharges constitute "point sources" as defined by 33 U.S.C. § 1362(14) and 40 C.F.R. § 122.2. Specifically, CLF puts M. Bradsher on notice that the unpermitted stormwater discharges associated with



Lamprey River, Great Bay, and the Atlantic Ocean. The Cocheco River flows downstream and outlets into the Piscataqua River, which thereafter flows into the Gulf of Maine and the Atlantic Ocean. All of the aforementioned waterbodies are “waters of the United States,” as defined in 40 C.F.R. § 122.2, and therefore, “navigable waters,” as defined in 33 U.S.C. § 1362(7). The Facilities are discharging industrial stormwater into these waterbodies without the permit required under Section 402 of the Act, 33 U.S.C. § 1342.

**b. M. Bradsher is discharging process water to waters of the United States without a permit.**

Wastewater associated with industrial processes, including, but not limited to, washing materials and paved surfaces and spraying machinery, is classified as “process wastewater” under the federal Clean Water Act and as defined in 40 C.F.R. § 122.2. Wastewater produced by washing materials and paved surfaces and spraying machinery can contain a variety of pollutants, including detergents, oil, grease, heavy metals, and other pollutants associated with the Facilities’ operations. In addition, solids suspended or dissolved in washwater can pollute ground and surface waters. Process wastewater can have severe and long-term impacts on aquatic environments.

Discharges of process water that result from washing materials and paved surfaces and spraying machinery are not covered under the MSGP. Discharges of process wastewater must instead be covered under an individual NPDES permit. To the extent that M. Bradsher uses water in its industrial processes, neither of M. Bradsher’s Facilities have an individual NPDES permit authorizing the discharge of process wastewater to waters of the United States. Therefore, CLF intends to pursue claims related to M. Bradsher’s unpermitted discharges of process water to waters of the United States, namely the Fresh River and the Cocheco River.

**c. M. Bradsher is violating the Clean Water Act by failing to obtain coverage and failing to comply with the requirements of the MSGP.**

M. Bradsher is violating 33 U.S.C. §§ 1342(p)(3)(A) and (p)(4)(A), and 40 C.F.R. §§ 122.26(c)(1) and (e)(1), by failing to apply for, obtain coverage, and comply with the requirements of the MSGP.<sup>25</sup> The Facilities have a primary SIC code prefix 1442 and must obtain coverage under the MSGP for its stormwater discharges and for stormwater discharges from any co-located industrial activities.<sup>26</sup> M. Bradsher’s failure to obtain coverage and comply

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industrial activity include discharges from the Facility areas specified in 40 C.F.R. § 122.26(b)(14). *See also* 40 C.F.R. § 122.2 (stating that the definition of “discharge of a pollutant” “includes additions of pollutants into waters of the United States from: surface runoff which is collected or channeled by man[.]”).

<sup>25</sup> *See* MSGP, *supra* note 2, at pts. 1.1–1.2.

<sup>26</sup> *Id.* at pts. 1.1, 8.A.

with the permit is in violation of the MSGP and Section 402, 33 U.S.C. § 1342(p) of the Clean Water Act.<sup>27</sup>

**1) M. Bradsher Must Develop and Implement a Stormwater Pollution Prevention Plan (SWPPP).**

As a prerequisite to applying for coverage under the MSGP, M. Bradsher must develop and implement a Stormwater Pollution Prevention Plan (“SWPPP”) for each of its Facilities.<sup>28</sup> The SWPPP must include, but is not limited to, the following: information related to a company stormwater pollution prevention team, a site description, a summary of pollutant sources, a description of control measures, and schedules and procedures pertaining to control measures and monitoring.<sup>29</sup> M. Bradsher has failed to develop and implement a SWPPP for either of its Facilities in accordance with the MSGP requirements in violation of the MSGP and Section 402(p) of the Clean Water Act, 33 U.S.C. § 1342(p).

**2) M. Bradsher Must Submit to EPA a Complete Notice of Intent to be Covered under the MSGP.**

To be eligible to discharge under the MSGP, M. Bradsher must submit a complete Notice of Intent (“NOI”) to the EPA for each of its Facilities.<sup>30</sup> To complete the NOIs, M. Bradsher is required to determine whether the bodies of water to which the stormwater discharges are “impaired” water bodies, and whether the Facilities discharge any specific pollutants listed on the NOI to those water bodies.<sup>31</sup> The Fresh River (Waterbody ID NHRIV600030708-02), which receives discharges from the Facility located at 181 Exeter Rd., Epping, NH 03042, is classified as an “impaired” water.<sup>32</sup> The Cocheco River (Segment ID NHRIV600030603-01), which receives discharges from the Facility located at 541 Farmington Rd. (NH Route 11), Farmington, NH 03835, is classified as an “impaired” water.<sup>33</sup> Additionally, as part of preparing the NOIs, the covered Facilities must make certain verifications such as ensuring that no harm is done to a species in violation of the Endangered Species Act.<sup>34</sup> For both of its facilities, M. Bradsher has failed to prepare and file an NOI meeting all applicable requirements in violation of the MSGP and the Clean Water Act, 33 U.S.C. § 1342(p).

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<sup>27</sup> A thorough search of EPA’s databases indicates that Malcolm Bradsher Co., Inc. has not filed an NOI for either of its facilities.

<sup>28</sup> *Id.* at pt. 5.

<sup>29</sup> *Id.* at pt. 5.2.

<sup>30</sup> *Id.* at pt. 1.2.

<sup>31</sup> *Id.* at pt. 2.2.2.

<sup>32</sup> *See supra* note 3.

<sup>33</sup> *See supra* note 6.

<sup>34</sup> *See* MSGP, *supra* note 2, at pts. 1.1.4.5, 2.3.



### **3) M. Bradsher Must Take Control Measures and Meet Water-Quality Effluent Limitations.**

To be eligible to discharge under the MSGP, M. Bradsher must select, design, install, and implement control measures (including best management practices) to prevent polluted stormwater discharges from reaching nearby waterbodies. M. Bradsher must address the selection and design considerations in the permit, meet the non-numeric effluent limitations in the permit, and meet limits contained in applicable permit effluent limitations guidelines.<sup>35</sup> These control practices must be in accordance with good engineering practices and manufacturer's specifications.<sup>36</sup> If the control measures are not achieving their intended effect of minimizing pollutant discharges, the permittee must modify these control measures as expeditiously as practicable.<sup>37</sup> At both of its Facilities, M. Bradsher has failed to cover the materials and operations that may result in polluted stormwater runoff. M. Bradsher has not implemented the required control measures in violation of the MSGP and Section 402(p) of the Clean Water Act, 33 U.S.C. § 1342(p).

### **4) M. Bradsher Must Conduct Routine Facility Inspections.**

To be eligible to discharge under the MSGP, M. Bradsher must conduct routine inspections of all areas of the Facilities where industrial materials or activities are exposed to precipitation, and must ensure that all stormwater control measures comply with the effluent limits contained in the MSGP.<sup>38</sup> Routine inspections must be conducted at least quarterly but in many instances monthly inspections are most appropriate.<sup>39</sup> These inspections must occur when the Facilities are in operation.<sup>40</sup> The schedule of these inspections must be included in the Facilities' SWPPPs and be performed by qualified personnel.<sup>41</sup> M. Bradsher has failed to conduct the required routine inspections in accordance with the MSGP requirements in violation of the MSGP and Section 402(p) of the Clean Water Act, 33 U.S.C. § 1342(p).

### **5) M. Bradsher Must Comply with the Required Monitoring and Sampling Procedures.**

To be eligible to discharge under the MSGP, M. Bradsher must collect and analyze stormwater samples and document monitoring activities consistent with the procedures in the MSGP.<sup>42</sup> The

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<sup>35</sup> *Id.* at pt. 2.1.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *See* MSGP, *supra* note 2, at pt. 3.1.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at pt. 6.

MSGP requires five types of analytical monitoring (one or more of which may apply) including quarterly benchmark monitoring, annual effluent limitations guidelines monitoring, State or Tribal-specific monitoring, impaired waters monitoring, and other monitoring as required by the EPA.<sup>43</sup> An operator must monitor each outfall identified in the SWPPP covered by a numeric effluent limit.<sup>44</sup> Required monitoring must be performed after stormwater events that result in an actual discharge on a required schedule.<sup>45</sup> All monitoring data collected under the Permit must be reported to EPA. Furthermore, because the Fresh River (Waterbody ID NHRIV600030708-02) and the Cocheco River (Segment ID NHRIV600030603-01) are classified as “impaired” waters under Section 303(d) of the Clean Water Act, 33 U.S.C. § 1313(d), M. Bradsher must monitor for all pollutants for which the Fresh River and the Cocheco River are impaired.<sup>46</sup> M. Bradsher has failed to conduct the required monitoring under the MSGP and has failed to submit the required monitoring reports to EPA in violation of the MSGP and the Clean Water Act, 33 U.S.C. § 1342(p).

#### **6) M. Bradsher Must Carry Out the Required Reporting and Recordkeeping.**

M. Bradsher must maintain and submit any and all required monitoring data.<sup>47</sup> Such monitoring data includes the following: an annual report to EPA which includes the Facilities’ findings from the annual comprehensive site inspections and any documentation of corrective actions;<sup>48</sup> an Exceedance Report to the EPA if any of the follow-up monitoring shows any exceedances of a numeric effluent limit;<sup>49</sup> and any other required reports under the MSGP.<sup>50</sup> M. Bradsher has failed to maintain the required records and failed to submit all required monitoring data under the MSGP in violation of the MSGP and Section 402(p) of the Clean Water Act, 33 U.S.C. § 1342(p).

#### **7) M. Bradsher Must Comply with the Requirements of MSGP Subpart 8.J**

M. Bradsher must also comply with the sector-specific requirements contained in Subpart J of the MSGP.<sup>51</sup> Subpart J requires construction sand and gravel facilities to implement additional technology-based effluent limits,<sup>52</sup> meet additional SWPPP and inspection requirements,<sup>53</sup> and monitor stormwater discharges for compliance with the benchmark limitations applicable

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<sup>43</sup> *Id.* at pt. 6.2.

<sup>44</sup> *Id.* at pt. 6.1.1.

<sup>45</sup> *Id.* at pt. 6.1.3.

<sup>46</sup> *Id.* at pt. 6.2.4.

<sup>47</sup> *See* MSGP, *supra* note 2, at pt. 7.1.

<sup>48</sup> *Id.* at pt. 7.5.

<sup>49</sup> *Id.* at pt. 7.6.

<sup>50</sup> *Id.* at pt. 7.7.

<sup>51</sup> *Id.* at appen. D, Table D-1, Sector J; pt. 8.J.

<sup>52</sup> *Id.* at pts. 8.J.4–8.J.5.

<sup>53</sup> *Id.* at pts. 8.J.6–8.J.7.

specifically to construction sand and gravel facilities.<sup>54</sup> M. Bradsher must also minimize contact of stormwater runoff with sand, gravel, stockpiled materials, processed materials and non-recyclable wastes through various control measures such as permanent or semi-permanent covers or roofs, interceptor or diversion controls (e.g., dikes, swales, curbs, or berms); pipe slope drains; subsurface drains; conveyance systems (e.g., channels or gutters, open-top box culverts, and waterbars; rolling dips and road sloping; roadway surface water deflector and culverts); or their equivalents.<sup>55</sup> M. Bradsher has failed to comply with the requirements of Subpart J of the MSGP in violation of the MSGP and Section 402(p) of the Clean Water Act, 33 U.S.C. § 1342(p).

### **DATES OF VIOLATION**

Each day on which M. Bradsher operates its Facilities without permit coverage or discharges stormwater and/or process water without a permit for each of the Facilities is a separate and distinct violation of Sections 301(a) and 402(p)(2)(B) of the CWA, 33 U.S.C. §§ 1311(a) and 1342(p)(2)(B).

M. Bradsher has discharged stormwater without a permit in violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a), on every day since at least 2010 on which there has been a measurable precipitation event. Each day on which M. Bradsher operates its Facilities without permit coverage or discharges process water without a permit from the Facilities are a separate and distinct violation of Section 301(a) of the CWA, 33 U.S.C. §§ 1311(a).

Every day, since at least 2010, on which M. Bradsher has failed and continues to fail to apply for, obtain coverage, and comply with the requirements of the MSGP is a violation of Section 402(p)(3)(A) and (p)(4)(A) of the CWA, 33 U.S.C. §§ 1342(p)(3)(A) and (p)(4)(A).

These violations are ongoing and continuous, and barring a change in the stormwater management controls at the Facilities and full compliance with the permitting requirements of the Clean Water Act, these violations will continue indefinitely.

### **RELIEF REQUESTED**

Malcolm Bradsher Co., Inc. is liable for the above-described violations occurring prior to the date of this letter, and for every day that these violations continue. Each separate violation of the Act subjects M. Bradsher to a penalty up to \$37,500 per day per violation for all violations occurring from January 12, 2009 through November 2, 2015, and \$51,570 for penalties that are assessed on or after August 1, 2016, for violations that occurred after November 2, 2015.<sup>56</sup> CLF will seek the full penalties allowed by law.

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<sup>54</sup> *Id.* at pt. 8.J.8.

<sup>55</sup> *Id.* at pt. 8.J.5.2.

<sup>56</sup> *See* 33 U.S.C. §§ 1319(d), 1365(a); 40 C.F.R. §§ 19.1–19.4.

In addition to civil penalties, CLF will seek declaratory relief and injunctive relief to prevent further violations of the Clean Water Act pursuant to Sections 505(a) and (d), 33 U.S.C. § 1365(a) and (d), and such other relief as permitted by law. CLF will seek an order from the Court requiring M. Bradsher to correct all identified violations through direct implementation of control measures and demonstration of full regulatory compliance.

Lastly, pursuant to Section 505(d) of the Act, 33 U.S.C. § 1365(d), CLF will seek recovery of costs and fees associated with this matter.

### **CONCLUSION**

During the 60-day notice period, CLF is willing to discuss effective remedies for the violations noted in this letter that may avoid the necessity of further litigation. If you wish to pursue such discussions, please have your attorney contact Zachary Griefen within the next 20 days so that negotiations may be completed before the end of the 60-day notice period. We do not intend to delay the filing of a complaint in federal court if discussions are continuing at the conclusion of the 60 days.

Sincerely,



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